In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1032

NORBERT K. LACHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of willfully failing to file income tax returns for the years 1964 through 1967, in violation of 26 U.S.C. 7203. He was fined $2,400 and sentenced to three months' imprisonment. The court of appeals affirmed (Pet. App. A, 22-28). Petitioner's principal contention here is that the jury was improperly instructed as to the degree of willfulness necessary for conviction under Section 7203.

At trial petitioner conceded that he had failed to file his tax returns at the time specified by law. His only defense was that the failure to file had not been willful, but he did not contend that he had been unaware of the legal obligation to file a return. A witness for the govern-

ment testified that petitioner had admitted his failure to file because he "just didn't get around to it" (Pet. 6).

The district court instructed the jury that if in failing to file, petitioner had "acted voluntarily, purposefully, deliberately, and intentionally," his failure was willful, but that it was not willful if he acted "inadvertently, negligently or mistakenly."[1]

2. Petitioner apparently contends (Pet. 8-17) that intention to defraud, or to evade tax liability, is a necessary component of willfulness under Section 7203. But proof of a tax deficiency is not necessary for a conviction for failure to file. *Spies* v. *United States*, 317 U.S. 492, 496; *United States* v. *Matosky*, 421 F. 2d 410, 412 (C.A. 7), certiorari denied, 398 U.S. 904; *Lumetta* v. *United States*, 362 F. 2d 644, 647 (C.A. 8). The district court clearly charged the jury that a failure to file a tax return must be intentional and not merely accidental; this standard of willfulness under Section 7203 now appears to have been adopted

[1] The district court's complete instructions on the issue of willfulness were as follows (Pet. App. A, 23, n. 1):

> "Willfully" as used in this law means that the defendant acted voluntarily, purposefully, deliberately, and intentionally in failing to file his return—that is, at the time for filing in failing to do so he had a deliberate intention not to file the return which he knew ought to have been filed.
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> This conduct, ladies and gentlemen, must be distinguished from inadvertently, negligently or mistakenly failing to file.
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> If you find the defendant in failing to file acted inadvertently, acted negligently or mistakenly then, of course, your verdict must be not guilty. On the other hand, if you find the defendant acted voluntarily, purposefully, deliberately and intentionally in failing to file his returns, then of course if you also find the Government has proven beyond a reasonable doubt the other elements I instructed you on, your verdict must be guilty—and the other elements that have been agreed to. So willfulness is the issue for you to decide.

by all courts of appeal which have considered the question. See *Turnof* v. *United States*, 468 F. 2d 632 (C.A. 2), certiorari denied, March 5, 1973, No. 72-917; *United States* v. *Vitiello*, 363 F. 2d 240 (C.A. 3);[2] *Haner* v. *United States*, 315 F. 2d 792 (C.A. 5); *Gurtner* v. *United States*, decided February 5, 1973, No. 72-2167 (C.A. 9) (prospectively overruling *Abdul* v. *United States*, 254 F. 2d 292).[3]

Petitioner also contends (Pet. 17-21) that the district court erred in refusing his requested instruction that "[m]ere laxity, careless disregard of the duty imposed by law, or even gross negligence * * *" (Pet. 17-18) does not constitute willfulness. But the charge actually given clearly instructed the jury that willfulness requires intentional and not negligent conduct, so that the substance of petitioner's requested charge was in fact communicated to the jury.

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[2] Contrary to petitioner's argument (Pet. 8-17), there is no conflict between the Third Circuit and the court below. The Third Circuit in *Vitiello* enunciated a willfulness standard of merely intentional conduct without requiring an intention to defraud the government; the court there reversed a conviction where the jury was instructed that careless failure to file was a violation of the statute. In the other Third Circuit cases cited by petitioner, *United States* v. *Cirillo*, 251 F. 2d 638, certiorari denied, 356 U.S. 949, and *United States* v. *Hartman*, 409 F. 2d 198, the court simply affirmed convictions where the jury was instructed on a higher degree of willfulness; since a lower standard would have been less favorable to the defendants, the court did not there have the question of the propriety of the higher standard squarely before it.

[3] See, also, *United States* v. *Bishop*, argued January 16, 1973, No. 71-1698, where we support the same willfulness standard of intentional conduct for the related tax misdemeanor under 26 U.S.C. 7207. But since *Bishop* involves Section 7207 and not Section 7203, the provision involved here, this petition need not be held pending disposition of that case. See *Turnof* v. *United States*, certiorari denied, March 5, 1973, No. 72-917.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.